No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF LOS ANGELES COUNTY'S DEPARTMENT OF HEALTH SERVICES, NYC HEALTH + HOSPITALS, AND SERVICE EMPLOYEES INTERNATIONAL UNION SUPPORTING RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

Amici curiae have all utilized collective bargaining to form beneficial labor-management partnerships, and *amici* believe fair-share fees are important to the continued success of their partnership work.

Los Angeles County's Department of Health Services is the second-largest municipal health care system in the country, serving 670,000 patients every year.[1] The Department of Health Services relies on partnerships with its unionized employees to improve quality and efficiency. Through labor-management partnership structures, the health system and its employees have already, among other achievements, reduced patient wait times, increased productivity, and increased scores on an important patient-satisfaction metric. The Department of Health Services joins in filing this brief because it believes the fair-share provisions in its collective bargaining agreements play an important role in fostering robust labor-management partnerships, benefitting the health system, its patients, and its employees alike.

NYC Health + Hospitals is the largest municipal health care system in the country, serving 1.2 million patients every year. Like many other public and private health systems, NYC Health + Hospitals uses labor-management partnership structures to improve care quality and efficiency. Through partnership work, the health care system and its employees have already, among other achievements, reduced needle-

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties' letters consenting to *amici* briefs are on file with the Clerk.

stick rates and reduced readmission rates for pediatric asthma patients. NYC Health + Hospitals joins this brief because it believes the fair-share provisions in its collective bargaining agreements are important to the continued success of its labor-management cooperative work.

The Service Employees International Union (SEIU) is the largest health care union in the United States. More than half of SEIU's two million members work in the health care industry, including as doctors, nurses, nursing assistants, therapists, technicians, administrative staff, janitorial workers, and food-service staff. Like its co-*amici*, SEIU believes fair-share fees are important to the success of its labor-management partnerships, which SEIU members care deeply about and to which they devote significant resources and effort.

SUMMARY OF ARGUMENT

There is a crucial constitutional difference between the government acting as employer and the government acting as sovereign, as this Court has often held. *See, e.g.*, *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 568 (1968). Because government agencies are charged by law with completing particular tasks, and hire employees to help complete those tasks effectively and efficiently, agency employers must be able to exercise significant control over their employees' words and actions. Government agencies thus have far greater leeway with respect to the speech and actions of their employees than with respect to the speech and actions of the public at large.

The analytical framework that applies to public-employee speech claims reflects these principles, and

petitioners' claims fail at each step of that framework. Public-employee speech is protected only when employees speak as citizens on matters of public concern, and the payment of fair-share fees is not citizen speech about matters of public interest. Moreover, even employees' citizen speech about matters of public concern is protected only when employees' interests outweigh the government's interest in managing its workforce to promote effectiveness and efficiency, and here the opposite is true. Public employees' interest in not paying fair-share fees is easily outweighed by public employers' contrary interests, including their interest in fostering robust labor-management cooperation, which has proven to be a successful strategy for achieving quality and efficiency gains.

The use of collective-bargaining systems to develop labor-management cooperative strategies has a long, successful history in both the private and public sectors. Partnership strategies have been shown in numerous studies to increase productivity and service quality while reducing cost. And partnership strategies are now an important part of many public employers' quality- and efficiency-improvement plans, including in health care where labor-management partnerships save money and improve patient care.

As described below, Kaiser Permanente (Kaiser) provides a leading private-sector example of the benefits of union-management cooperation in health care, and *amici* Los Angeles County's Department of Health Services (LA-DHS) and NYC Health + Hospitals (NYC-HH), the nation's two largest public health care systems, likewise benefit from robust labor-management cooperative structures. LA-DHS's and NYC-HH's labor-management partnerships have, among other achievements, increased patient-satisfaction

scores, reduced patient wait times and no-show rates, and improved post-discharge follow-up for pediatric asthma patients.

As all *amici*'s experiences demonstrate, modern collective-bargaining relationships have evolved as public employers, following private-sector examples, have found that they can partner with unions to gain competitive advantages. Public employers' labor-relations interests are thus no longer limited merely to avoiding strikes and other disruptive events, if they ever were. Instead, public employers have a strong interest in using stable collective-bargaining systems to foster labor-management partnerships that can achieve quality and efficiency gains—and, as a result, have a strong interest in fair-share-fee requirements because fee requirements make employers' partnership strategies much more likely to succeed.

Fair-share-fee policies serve employers' partnership interests in a number of ways. They play a key role in overcoming workforce skepticism about labor-management cooperation by ensuring that employers have credible union partners capable of legitimating partnership work. Fair-share-fee policies also foster cooperation by stabilizing labor relations and reducing incentives labor and management might have to treat each other as adversaries. And fair-share fees ensure that employers' labor partners have sufficient resources to make long-term contributions to cooperative work, further validating that work among employees and increasing partnership's strategic effectiveness.

In sum, petitioners' claims fail because paying fair-share fees is not citizen speech on matters of public concern and because public employers' interests in

using strong, stable collective-bargaining relationships to foster labor-management partnerships fully justifies employers' fair-share-fee arrangements, which have been lawful and well-accepted for decades.

ARGUMENT

I. PAYING FAIR-SHARE FEES IS NOT CITIZEN SPEECH ON MATTERS OF PUBLIC CONCERN, AND PETITIONERS' INTERESTS ARE OUTWEIGHED BY CONTRARY EMPLOYER INTERESTS.

This Court has long recognized that because government agencies are "charged by law with doing particular tasks," *Waters v. Churchill*, 511 U.S. 661, 674–75 (1994) (plurality op.), and hire employees to help perform those tasks, *id.* at 675, agency employers, "like private employers, need a significant degree of control over their employees' words and actions." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Public employers are thus afforded "wide discretion ... over the management of [their] personnel and internal affairs," *Connick v. Myers*, 461 U.S. 138, 151 (1983) (quotation marks and citation omitted), and there is "a crucial difference, with respect to constitutional analysis" between the government as "sovereign" and the government as employer, acting "to manage [its] internal operation." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) (alteration in original) (internal quotation marks and citation omitted). Since the "government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest ... to a significant one when it acts as employer," *id.* (quoting *Waters*, 511 U.S. at 675), the government "has significantly greater leeway" when dealing with public employees' speech

than when dealing with other citizens' speech. *Id.* at 599.

The analytical framework that applies to public-employee speech claims reflects these principles. A public employee's speech is not protected unless the employee speaks as a citizen on a matter of public concern. And even then, the employee's interest must outweigh "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150; *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224–26 (1977) (describing some public-employer interests served by fair-share fees).[2]

When competing interests are balanced, public employers' assessments of their own interests and of what may interfere with those interests are entitled to "[d]eference" provided they are "reasonable." *Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 678 (1996); *see also Waters*, 511 U.S. at 673, 678; *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 100–115 & n.3 (1990) (Scalia, J., dissenting) (because of wide discretion afforded government as employer, public-employee speech cases apply reasonableness standard). Furthermore, a government employer need not believe that achievement of its mission would be impossible absent a challenged speech policy, nor demonstrate that it has adopted the least speech-restrictive policy possible, nor wait for employee speech (or non-speech) actually to interfere with its operations before taking action. *See Waters*,

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[2] *Abood* was correctly decided, is further buttressed by the additional employer interests discussed in this brief, and is of a piece with *Connick* and other public-employee speech cases in distinguishing between citizen and employee speech and in balancing employer versus employee interests.

511 U.S. at 676; *Connick*, 461 U.S. at 151–52. Instead, an employer may constitutionally restrict employee speech or conduct that it reasonably believes will "hinder[] efficient operation," *Connick*, 461 U.S. at 151, even if the employer runs "some risk of erroneously punishing protected speech." *Waters*, 511 U.S. at 676; *see also Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2497 (2011) (speech restraints permissible when workplace "*may* be affected" (emphasis added)); *Garcetti*, 547 U.S. at 418 (employer may restrict speech that "has some potential" to affect operations). *Compare United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 n.21 (1995) (explaining that Hatch Act's employee-protective rationale justified prospective speech-limiting rule), *with* Cal. Gov't Code §3540 (stating employee-protective purposes for statute at issue).[3]

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[3] Petitioners' assorted arguments for casting aside the principles that have traditionally governed public-employee speech claims, including in *Abood*, are without merit: The political-patronage cases are inapposite because they address a criterion, raw "political affiliation," *O'Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712, 719 (1996), that is functionally irrelevant to the effective operations of a public enterprise, *see Elrod v. Burns*, 427 U.S. 347, 365 (1976) (plurality op.). The same cannot be said here. Nor is there any foundation in law or logic for petitioners' other theories that compelled-speech claims require a different analysis, *contra, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); that prospective rules cannot be analyzed within the traditional framework, *contra, e.g.*, *Waters*, 511 U.S. at 673; *Connick*, 461 U.S. at 152; *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947); or that it matters that California has embodied its fair-share-fee requirement in statute, *contra, e.g.*, *United Pub. Workers*, 330 U.S. at 103. Indeed, if that last, California-specific fact did matter, this case would be an inappropriate vehicle for announcing a nationwide rule.

Petitioners' claims fail at each step of the applicable analysis. As an initial matter, petitioners have never argued, let alone demonstrated, that their payment of fair-share fees is speech they make as citizens rather than as employees. *See* Petitioners' Br. 47–51. Nor could they, since fair-share fees are paid only by employees, in fulfillment of employment duties, via deductions from employee pay, and pursuant to statutory schemes and collective bargaining agreements that have no application to private citizens. *Compare* Cal. Gov't Code §3546(a) (payment "required" "as a condition of continued employment"), *with Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014) (court testimony was citizen speech because of "distinct and independent" duty to "court and society ... to tell the truth"). As Justice Scalia explained in a similar context in his opinion in *Guarnieri*, something done pursuant to a collective bargaining agreement is not done "as [a] citize[n] for First Amendment purposes" because "there is no relevant analogue" in the conduct of non-employee private citizens. 131 S. Ct. at 2506 (Scalia, J., concurring in the judgment in part and dissenting in part) (alterations in original) (quoting *Garcetti*, 547 U.S. at 421, 423–24); *cf. id.* ("A union grievance is the epitome of a petition addressed to the government in its capacity as ... employer.").

The payment of fair-share fees is also not speech about matters of public concern. Petitioners themselves effectively concede that at least some fair-share-funded speech fails to meet the Court's public-concern standard, *see, e.g.*, Petitioners' Br. 45 (discussing grievances), and case law makes clear that other types of collective-bargaining speech fail to meet that standard as well. *Guarnieri*, for example, describes employees' efforts to influence their employers' "[b]udget priorities, personnel decisions, and substantive policies" as

efforts regarding "internal" matters "typically left to the discretion of public officials." 131 S. Ct. at 2496–97; *see also Connick*, 461 U.S. at 141, 148–49 (questions regarding office transfer policy, morale, "need for a grievance committee" and "level of confidence in supervisors" were "internal office affairs"). Yet these are exactly the kinds of internal processes and decisions that petitioners now claim make the payment of fair-share fees speech on matters of public concern. *See, e.g.*, Petitioners' Br. 11–12 (fees support efforts to influence decisions about "allocating scarce public funds" and "supervis[ing] teachers").

In addition, and as discussed in greater detail below, petitioners' claims fail because any interest public employees have in not paying their fair share for union services is easily outweighed by public employer interests furthered by fair-share-fee policies, including public employers' interest in implementing successful labor-management cooperative strategies. While petitioners' blinkered view ignores all but public employers' interests in labor peace and preventing free riding (which petitioners understand only in their narrowest sense and which, even so understood, are significant and would be frustrated by the elimination of fair-share fees), the current fair-share-fee system does much more to further employer interests than merely prevent strikes and other workplace disruptions. In particular, the current fair-share-fee system serves employers' interests in improving quality, efficiency, staff cohesion, and employee morale by enabling and strengthening labor-management relationships, allowing for the development of collaborative partnerships. *See infra* Part II; *cf. Garcetti*, 547 U.S. at 424–25 (citing employer interests in efficiency

and quality); *Connick*, 461 U.S. at 150–51 (citing employer interest in close working relationships).[4]

There is nothing anomalous or unrealistic about a public-employer policy that arguably aids employee unions as a means of serving employer interests. This Court upheld such a policy in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), permitting a state-agency employer to establish an internal forum for discussion solely with its employees' union when doing so served the state's interests. *Id.* at 274–75, 291–92; *see also Perry Educ. Ass'n v. Perry*

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[4] *Amici* note that public employers' interests should carry particularly great weight in this case given the factual context. *Cf. Connick*, 461 U.S. at 150–51 (weight given competing interests depends on context). For one thing, the speech at issue (*i.e.*, fair-share-funded speech) is directed to employers rather than to the general public, *see Abood*, 431 U.S. at 235–36, and employers have additional leeway with respect to internally directed speech because they are best positioned to know what will interfere with their own operations, *see generally Garcetti*, 547 U.S. at 422–23, and because employees' ability to participate in public debate is not implicated. *See Connick*, 461 U.S. at 148 (significant that employee "did not seek to inform the public"); *see also Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976) (even in collective-bargaining systems, employees remain free to participate in debates in public fora). For another, fair-share-fee policies are not stand-alone provisions aimed at compelling speech but are usually part of a state's "comprehensive program" for managing labor relations, *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001), with any effects on individuals' speech incidental to the state's legitimate labor-relations goals. *Cf. id.* at 411–14 (more leeway when speech restrictions ancillary to larger "scheme of economic regulation" that serves "overriding associational purpose"). Finally, fair-share-funded speech is, *at best* for petitioners, mixed non-public and public-matter speech, which also weighs in the public employers' favor. *See Connick*, 461 U.S. at 150, 154.

Local Educators' Ass'n, 460 U.S. 37 (1983) (school district could allow union to use inter-school mail while excluding others); *cf. id.* at 49 n.9 (explaining that when union becomes exclusive representative, it "assume[s] an official position in the operational structure of the District's schools"). Similarly here, public employers have reasonably chosen a policy, *i.e.*, requiring payment of fair-share fees, that serves their interests by helping to foster robust labor-management partnerships. Indeed, in doing so, public employers have chosen a strategic option that was identified as open to them in *Garcetti*—instituting "policies and procedures" that help create a "forum" in which employees (who are often "in the best position to know what ails the agencies for which they work," *Waters*, 511 U.S. at 674) feel comfortable communicating ideas and concerns directly to their employer. *Garcetti*, 547 U.S. at 424.

II. LABOR-MANAGEMENT PARTNERSHIPS SERVE EMPLOYER INTERESTS.

Labor-management partnerships have deep roots in American workplace history and have been shown, *inter alia*, to improve service quality and reduce employer costs. Partnership is particularly well-established as a strategy in health care and is familiar to many in that field as a proven method for achieving quality and efficiency gains. Kaiser relies heavily on partnership in the private sector, and public-sector *amici* LA-DHS and NYC-HH benefit from robust union-management collaborative systems as well. Public health care employers, like their private-sector counterparts, should continue to have the option of using fair-share-fee policies to enable and strengthen labor-management partnerships.

A. The History and Literature Supporting Partnership

Labor-management partnerships developed through stable collective-bargaining institutions have a long history of providing benefits to employers and employees. In the 1920s, for example, several leading railroads and employee unions worked together to expand passenger service nationwide. Thomas A. Kochan *et al.*, *Healing Together: The Labor-Management Partnership at Kaiser Permanente* 19 (2009). At about the same time, the International Brotherhood of Electrical Workers entered into its now nearly 100-year-old partnership with the National Electrical Contractors Association (NECA). *See* Eileen Appelbaum & Larry W. Hunter, *Union Participation in Strategic Decisions of Corporations*, *in* Emerging Labor Market Institutions for the Twenty-First Century 265, 272–73 (Richard B. Freeman *et al.* eds., 2004), *available at* http://www.nber.org/chapters/c9958.pdf. That partnership has trained thousands of electricians and undertaken other collaborative projects, including successfully increasing NECA contractors' market share. *Id.*

More recent examples of successful cooperation include: a union-management partnership that played a key role in bringing Harley-Davidson back from near bankruptcy, Kochan *et al.*, *supra*, at 19; a steel-industry partnership that "contributed heavily" to the industry's "turnaround," Appelbaum & Hunter, *supra*, at 276–77; a labor-management partnership at Xerox that reduced costs and improved manufacturing processes, *see* Peter Lazes & Tony Costanza, *Xerox Cuts Costs Without Layoffs Through Union-Management Cooperation*, Labor-Management Cooperation Br. (Bureau of Labor-Management Relations & Cooperative Programs, U.S. Dep't of Labor), July 1984, http://

www.ilr.cornell.edu/scheinman-institute/research-and-initiatives/newsletters-and-reports (follow link to PDF); and labor-management partnerships at Southwest Airlines that have played an important part in that company's success, *see* Jody Hoffer Gittell, *The Southwest Airlines Way: Using the Power of* Relationships *to Achieve High Performance* 22–23, 165–82 (2003) (Southwest's union-management partnerships have, among other things, helped achieve particularly short landing-to-takeoff turnaround times).

The success of many of these partnerships flows from the fact that robust union-management cooperation increases employees' willingness to share ideas and concerns with management, which in turn leads to quality and efficiency improvements. By giving workers confidence that information they provide will not be used against them and that time spent on collaborative work will not be wasted, labor-management partnerships encourage employees to speak up. *See, e.g.*, Ariel C. Avgar *et al.*, *Labor-Management Partnership and Employee Voice: Evidence from the Healthcare Setting*, Indus. Rel.: J. of Econ. & Soc'y (accepted) (manuscript 6, 15–16, 27), http://www.researchgate.net/publication/280216324_Labor_management_partnership_and_employee_voice_Evidence_from_the_healthcare_setting (for the reasons described, strong partnerships increase health care workers' willingness to voice ideas for improving patient care); Peter Lazes *et al.*, *How Labor-Management Partnerships Improve Patient Care, Cost Control and Labor Relations*, ILR Sch., Cornell Univ. 19 (Feb. 1, 2012), http://www.ilr.cornell.edu/scheinman-institute/research-and-initiatives/newsletters-and-reports (follow link to PDF) (in partnership, according to worker, "nobody is afraid to say, 'We need to change this'"). Ideas that employees feel confident sharing

because of partnership then lead in many cases to quality and efficiency improvements that serve employer interests. *See* discussion *infra*; *see generally* Paul Adler *et al.*, *Building a Collaborative Enterprise*, Harv. Bus. Rev., July-Aug. 2011, *available at* https://hbr.org/2011/07/building-a-collaborative-enterprise/ar/1 (employers cannot meet "today's market imperative" to "innovate fast enough" while "simultaneously improving cost and efficiency" without "true collaboration" between front-line staff and supervisors).[5]

Indeed, a number of research studies show that robust labor-management partnerships generate significant benefits for employers in the areas of service quality, efficiency, productivity, morale, and workforce training. With respect to quality and efficiency, for example, two recent studies found that the implementation of labor-management partnership structures in health care facilities led to reduced costs and improved care because partnership gave employees a safe forum in which to voice ideas and concerns. Efficiency gains included $51,000 in wage savings at one facility, a reduction in staff turnover from 14% to 3.9% at

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[5] *See also* Kochan *et al.*, *supra*, at 155 (quoting management executive: Before partnership, "[labor] had ideas but they never surfaced or if they did, they never went anywhere. It was a learning process for me to ... see what was possible if management was ready to listen."); Gittell, *supra*, at 171 (quoting manager: "If we have a concept we want to kick around, we want to get the union involved ... to see if there are flaws.").

Of course, improvement projects can also meaningfully enhance employees' day-to-day working lives, which explains why surveys show that employees care deeply about such projects and want and expect their unions to contribute to quality-improvement efforts. *See, e.g.*, *QI Survey Says*, Newsletter (Doctors Council, New York, N.Y.), Apr. 2014, at 1, http://doctorscouncil.org/wp-content/uploads/2015/09/QI-Mailer-April-2014-NF.pdf.

another, and reduced nurse turnover and expensive traveling-nurse hiring at another. Avgar *et al.*, *supra*, at 20; Lazes *et al.*, *supra*, at iii, 18, 49. Quality-of-care improvements included a 44% to 83% increase in the number of referred home-care patients seen within 24 hours, a decline in fall rate from 3.07 to 2 falls per 1,000 patients, and achievement of a 45-minute stroke alert to test result turnaround-time benchmark. Avgar *et al.*, *supra*, at 20; Lazes *et al.*, *supra*, at 51; *see also* Kochan *et al.*, *supra*, at 208, 85 (worker involvement in Kaiser partnership correlated with significant upward trends in immunization, asthma-monitoring, and lipid-screening rates, and "[w]here partnership ... became an integral part of health care delivery at Kaiser" it "clearly generated significant economic payoffs").

Labor-management partnerships have also been shown to increase productivity by creating an environment in which employees feel comfortable pooling their skills and knowledge to create better workplace processes. An analysis of the labor-management partnership at Xerox found that work areas transformed by partnership experienced lower costs and higher productivity than work areas left with a traditional model of labor-management relations. *See* Joel Cutcher-Gershenfeld, *The Impact on Economic Performance of a Transformation in Workplace Relations*, 44(2) Indus. Lab. Rel. Rev. 241, 241, 254 (Jan. 1991). And a review of national business-survey data found higher productivity in union-management collaborative workplaces than in either non-union or union-but-not-collaborative workplaces. Sandra E. Black & Lisa M. Lynch, *How to Compete: The Impact of Workplace Practices and Information Technology on Productivity* 3 (Nat'l Bur. of Econ. Research, Working Paper No. 6120, 1997), *available at* http://www.nber.org/papers/

w6120.pdf; *see also* Appelbaum & Hunter, *supra*, at 266 ("[T]he benefits of [worker] involvement typically outweigh costs associated with joint decision making. Empirical evidence demonstrates improvements in productivity, quality, delivery times, and even financial performance as a result of worker participation[.]"); Michael Schuster, *The Impact of Union-Management Cooperation on Productivity and Employment*, 36(3) Indus. Lab. Rel. Rev. 415, 415, 430 (Apr. 1983) (after partnership was implemented, productivity increased at six of eight plants where it could be measured).

Union-management partnerships also often increase employees' commitment to employer mission and improve staff morale by giving the workforce a sense of "shared purpose," Adler *et al.*, *supra*, and "participation," William Brock III, *The Importance of Labor-Management Cooperation*, 11 J. Lab. Res. 225, 227, 229 (1990) (author served as Secretary of Labor from 1985–1987). *See also* Kochan *et al.*, *supra*, at 203–04, 212 (partnership increased employee satisfaction, which correlated with patient satisfaction); Sally Klingel & David B. Lipsky, *Joint Labor-Management Training Programs for Healthcare Worker Advancement and Retention* 3, 55 (Cornell Univ., ILR Sch., Research Studies & Reports, 2010), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1042&context=reports (discussing morale improvement). And the collaborative culture associated with successful partnership often spills over, easing labor-management discussion of ordinarily contentious topics not specifically within the partnership's scope. *See, e.g.*, Cutcher-Gershenfeld, *supra*, at 245 (at Xerox, "patterns of problem-solving that developed around issues in which there were strong common interests ... came to inform the way potentially more contentious issues were handled").

Finally, labor-management partnerships benefit employers in the area of workforce training. Today's economy demands high levels of "company-specific" skill development, but employees are often reluctant to invest in firm-specific skills unless they trust their employer and feel their jobs are secure. *See* Appelbaum & Hunter, *supra*, at 268–69. Union involvement in joint labor-management training programs helps overcome this workforce hesitation by creating "a sense of trust ... that supports increased enrollment." Klingel & Lipsky, *supra*, at 50–51. When unions are involved, "the workforce more readily embraces participation in training," *id.* at 50, and completion rates are significantly higher than in comparable community-college programs. *See The Value Provided By Labor Management Training Partnerships In Healthcare,* Healthcare Career Advancement Program 3, http://www.h-cap.org/files/2011/04/LM-Training-Partnerships.pdf (last visited Nov. 6, 2015) (completion rates in joint labor-management training programs at or above 75% compared to 39.1% for community college).

Not surprisingly given this history and literature demonstrating partnership's benefits, experts have long endorsed labor-management cooperation as a useful employer strategy. The Reagan-era Department of Labor took "a strong position in support of labor-management cooperation as an important prerequisite to America's return to preeminence in the world marketplace." Stephen I. Schlossberg & Steven M. Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 3 Lab. Law. 11, 12 (1987), *available at* http://www.jstor.org/stable/40862364 (article co-authored by a Deputy Under Secretary of Labor); *see also* Brock, *supra*, at 228, 229 (labor-management cooperation is "logical and profitable," "makes good

sense" and "is a matter of survival" in high-tech society). A few years later, the Dunlop Commission, convened by the Departments of Commerce and Labor to study the future of labor-management relations, concluded after an exhaustive literature review and after hearing from hundreds of witnesses that the evidence "is overwhelming that ... labor-management partnerships are good for workers, firms, and the national economy." The Dunlop Comm'n on the Future of Worker-Management Relations, *Final Report* 8 (Dec. 1, 1994), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

B. Private Health Care Employers Benefit from Labor-Management Partnerships.

Many private health care employers benefit from labor-management partnerships and credit them with "improv[ing] productivity and patient care" and creating a "competitive advantage." Maimonides Med. Ctr. *et al.*, *Strategic Alliance Rep. 2007: Creating Competitive Advantage in a Changing Health Care Environment Through Worker Participation* 1, 3 (2007), http://www.ilr.cornell.edu/sites/ilr.cornell.edu/files/Maimonides%20Report.pdf [hereinafter Maimonides]. These private employers' experiences demonstrate the usefulness of partnership as a business strategy and the reasonableness of public employers who seek to adopt it.

Kaiser's Labor Management Partnership (LMP) is perhaps the best-known example of a successful cooperative strategy in private health care. LMP, created in 1997, is based on a series of agreements between Kaiser and its employees' unions and today "covers more than 100,000 union members and tens of

thousands of managers and physicians." *What Is Partnership?*, LMP, http://www.lmpartnership.org/what-partnership (last visited Nov. 6, 2015). Kaiser describes its LMP as a "business strategy" to improve care while reducing inefficiency, *id.* and Kaiser "earned Medicare's highest overall rating for quality and service in its California, Colorado, Hawaii, Mid-Atlantic States and Northwest regions" in 2014. Paul Cohen, *Unit-Based Teams Help KP Achieve Top Medicare Ratings*, LMP (Oct. 17, 2014), http://www.lmpartnership.org/stories-videos/unit-based-teams-help-kp-achieve-top-medicare-ratings.

Kaiser's experience shows how union-management partnership can serve employer interests. Kaiser's 3,500 unit-based partnership teams (UBTs)—teams of frontline managers, employees, and physicians, co-led by management and labor—develop efficiency- and quality-improvement projects that benefit the employer. *See* Kochan *et al.*, *supra*, at 191–97; Cohen, *supra*. One California UBT saved Kaiser an average of $132,000 per operating room by codifying a new protocol that reduced turnaround time between surgeries, increasing the number of daily procedures. *See* Adler *et al.*, *supra* (inset "*A Collaborative Dance at Kaiser Permanente*"). Another UBT increased patient screening for cancer, diabetes, and other risks by improving follow-through on electronic-record prompts from 80% to 95%. *See* Cassandra Braun, *Allergy Team Helps Screen for Cancer*, LMP (Feb. 5, 2014), http://www.lmpartnership.org/stories-videos/allergy-team-helps-screen-cancer. Partnership has also improved the workplace culture at Kaiser by "increas[ing] engagement of frontline staff" and "encourag[ing] greater openness and willingness to change for both staff and management." Lazes *et al.*, *supra*, at 29, 19.

Other private health care employers benefit from labor-management collaborative strategies as well. At Pittsburgh's Allegheny General Hospital, for example, a nurse-initiated partnership virtually eliminated certain hospital-acquired, central-line and catheter-associated infections, *see Improving Care, Lowering Costs*, SEIU 3 (Apr. 2015), https://action.seiu.org/page/-/HospitalQuality.pdf [hereinafter *Improving Care*], which are devastating for patients and costly for health care employers because their treatment is not Medicare-reimbursable, *Hospital-Acquired Conditions (Present on Admission Indicator)*, CMS (last modified Sept. 29, 2014), https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalAcqCond/index.html. Allegheny and its employees have since formed more labor-management teams, and, according to the hospital's Chief Nursing Officer, the hospital believes partnership will "significantly improve ... patient outcomes[.]" *Improving Care*, *supra*, at 3; *see also* Maimonides, *supra*, at 3, 5, 18–24 (crediting labor-management partnerships with "help[ing] Maimonides to thrive in the ever-changing health care environment" and "improv[ing] productivity and patient care," including by reducing waiting times for radiology services by 40%, reducing patient falls by 50%, and increasing on-time meal delivery from 80% to 90%).

C. Labor-Management Partnerships Serve Public Health Care Employers' Interests.

Much as private health care employers benefit from labor-management collaborative structures, major public-sector health care systems, including *amici* LA-DHS and NYC-HH, rely on robust labor-management partnerships to improve quality and efficiency. The partnerships at LA-DHS and NYC-HH have, *inter alia*, improved patient-satisfaction scores, increased

the percentage of patients who see their doctor within fifteen minutes, reduced patient no-show rates, and increased post-discharge follow-up for pediatric asthma patients. Given all the evidence supporting partnership and its successful use by private employers, LA-DHS and NYC-HH's reliance on labor-management collaboration is eminently reasonable, well within their discretion, and ensures that public health care systems will not be put at a "competitive [dis]advantage" vis-à-vis their private-sector peers. Maimonides, *supra*, at 1.

1. LA-DHS

LA-DHS is the second-largest municipal health care system in the country with 19,000 staff and 670,000 patients treated annually. *See About DHS*, Health Servs. L.A. Cnty., http://dhs.lacounty.gov/wps/portal/dhs/moredhs/aboutus/ (last visited Nov. 6, 2015). LA-DHS has traditionally been a "safety net" provider for low-income county residents, but health care reform made the environment within which LA-DHS operates more competitive and accountability-driven by strengthening pay-for-performance programs and giving newly insured, low-income patients more choice among providers. These changed market conditions have led LA-DHS to focus even more aggressively on providing high-quality care. *See generally* LA-DHS, *2013/2014 Annual Report* 3 (2014), http://file.lacounty.gov/dhs/cms1_221813.pdf [hereinafter *LA-DHS Annual Rep.*]. Recognizing the importance of enlisting employee input and support for needed changes, LA-DHS has made labor-management partnership a key component of its quality- and efficiency-improvement strategy. *See, e.g.*, Michael Wilson, *DHS and SEIU 721 Focused on System Improvement*, Fast Facts from Dr. Katz (LA-

DHS, L.A., Cal.), Aug. 3, 2015, at 1–2, http://file.lacounty.gov/dhs/cms1_232049.pdf.

One particularly successful collaborative project kick-started LA-DHS's strategic focus on partnership. With help from the Healthcare Career Advancement Program, LA-DHS and SEIU Local 721 worked together to educate front-line housekeeping and food-service staff about working more efficiently, with fewer toxic chemicals, and in ways likely to reduce hospital-acquired infections. *See* Laura Chenven & Danielle Copeland, *Front-Line Worker Engagement: Greening Health Care, Improving Worker and Patient Health, and Building Better Jobs*, 23(2) New Solutions 327 (Jan. 2013), *abstract available at* http://www.ncbi.nlm.nih.gov/pubmed/23896075. The project improved LAC-USC Medical Center's score on the "cleanliness" measure of a leading patient-satisfaction survey from 49% to 86%, *id.* at 335, which is important not only for quality and customer-service reasons but also because cleanliness scores are used to help determine hospital reimbursement rates under Medicare's "value-based purchasing" methodology. *See Hospital Value-Based Purchasing*, Medicare.gov, https://www.medicare.gov/hospitalcompare/data/hospital-vbp.html (last visited Nov. 6, 2015).

Following the success of that project, LA-DHS expanded its reliance on union-management collaborative work. At the system-wide level, LA-DHS and SEIU Local 721 formalized their partnership by forming a Labor Management Transformation Council, with joint labor-management sub-committees focused on, among other things, improving care quality and patient experience. *See* Wilson, *supra*, at 1. At the clinic level, LA-DHS implemented a system of labor-management Care Improvement Teams

(CITs), similar to Kaiser's UBTs, which meet on a weekly basis to plan and implement projects that lead to measurable improvements. *See LA-DHS Annual Rep.*, *supra*, at 10, 12, 23; Brian Yoshio Laing M.D., M.P.H. *et al.*, *A Quasi-experimental Evaluation of Performance Improvement Teams in the Safety-Net: A Labor-Management Partnership Model for Engaging Frontline Staff*, J. Pub. Health Mgmt. & Prac. (forthcoming) (on file with author) (manuscript at 2), *abstract available at* http://journals.lww.com/jphmp/Abstract/publishahead/A_Quasi_experimental_Evaluation_of_Performance.99727.aspx (UCLA study of CITs). SEIU Local 721 gives the CIT program credibility with frontline staff, and the union contributes or has contributed to the program by leveraging its members' experiences with Kaiser for LA-DHS's benefit, selecting labor co-leads, dedicating significant staff time and financial resources (including paying a consultant to assist in implementation), and funding and conducting union-member surveys to surface quality-improvement ideas and encourage employees to invest in collaborative work. *See* Laing *et al.*, *supra*, at 2; Interview with Patricia Castillo, L.A. Cnty. Reg'l Health Dir., SEIU 721, in L.A., Cal. (Sept. 10, 2015).

LA-DHS CITs have already achieved measurable quality and efficiency improvements. One gastroenterology CIT developed a three-month program focused on improving patient follow-up that reduced appointment "no shows" by 18%. *See MLK CIT Project Report*, SEIU 721, 1 (Jan. 26, 2015), https://www.seiu721.org/MLK%2520projects%25201-28-15-2.pdf (spreadsheet tracking CIT projects and results). A hematology/oncology CIT increased from 45% to 100% the number of patients who reported seeing their physician within fifteen minutes of appointment time,

a key measure on a leading health care performance survey. *Id.*; *see also* Laing *et al.*, *supra*, at 6, table 3 (listing other CIT achievements, including increased productivity); *Improving Care*, *supra*, at 6 (listing additional CIT achievements, including reduced pediatric-patient wait times).

LA-DHS's CIT program has also been found to increase staff "adaptive reserve," which is defined as a clinic's ability to make and sustain change and which is "important for success in adopting clinical improvements." Laing *et al.*, *supra*, at 3. A UCLA study of CITs' effects at one facility found that the average adaptive-reserve score in departments with labor-management CITs increased by 0.11 units after six months, while the average score in clinics without CITs decreased by 0.13 units—a statistically significant difference. *Id.* at 4. The study's authors described some staff who had previously participated in improvement projects "imposed" or "dictated" by management as being "skeptical" of cooperation, but the authors found that workers who participated in collaborative CITs "were less skeptical," "gave more examples of projects they were involved in which they felt made a positive change," and generally considered the new, union-management joint teams "a positive step." *Id.* at 5.

2. NYC-HH

NYC-HH has also implemented and come to rely on labor-management cooperation as an important method for improving quality and efficiency.

NYC-HH is the largest municipal health care system in the country, serving more than one million patients annually. *See* NYC-HH, *2014 Report to the Community* (2014), http://www.nyc.gov/html/hhc/

downloads/pdf/publication/2014-hhc-report-to-the-community.pdf. The system's unionized workforce includes attending-physician members of SEIU's Doctors Council, intern and resident members of SEIU's Committee of Interns and Residents (CIR), and licensed practical nurses and other front-line staff represented by 1199SEIU United Healthcare Workers East (1199 UHE).

Together, NYC-HH and its employees' unions have developed highly sophisticated labor-management collaborative practices. For example, the health care system and CIR (with help from CIR's Policy and Education Institute) recently launched resident Quality Improvement Clinics, which have already led to measurable quality-of-care improvements. *See generally* Press Release, *Resident QI Clinics Launch at Harlem and Bronx-Lebanon Hospital Centers with Mentorship from Society of Hospital Medicine*, PEI & Soc'y of Hosp. Med., http://www.cirseiu.org/2015/01/23/transforming-residency-training/. The Clinics identify areas for improvement and allow residents to develop and lead quality-improvement projects, like a project to reduce needle-stick rates and another to reduce the readmission of pediatric asthma patients by improving attendance at post-discharge follow-up appointments. *See, e.g.*, Bhuvana Sunil, M.D. *et al.*, *Improving Post-Discharge Follow Up of Pediatric Asthma Patients at Harlem Hospital: A Resident-Led QI Project* (2015), http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/10/AHI-Abstract-Pediatric-asthma-QI-Clinic.pdf (abstract accepted for presentation at the Academy for Healthcare Improvement Annual Conference). The latter project had a goal of increasing attendance at post-discharge follow-up appointments from 37% to 75% over the course of nine months and reached its target in its third month. *Id.*

NYC-HH, CIR and 1199UHE have also teamed up to organize and conduct educational "Grand Rounds" for staff on quality-of-care topics, such as medication safety. *See, e.g.*, *NYC Medication Safety Grand Rounds Reach Hundreds*, CIR Vitals (Oct. 18, 2012), http://www.cirvitals.org/2012/10/18/nyc-medication-safety-grand-rounds-reach-hundreds/. And NYC-HH and CIR hold regular House Staff Safety Council meetings, which provide residents a safe space to raise patient-safety concerns, and the health system and union co-sponsor patient-safety forums as well, including one on improving medication safety. *See* Letter from Alan D. Aviles, CEO/President, NYC-HH, George Gresham, President, 1199SEIU & Hillary Tompkins, M.D., President, CIR/SEIU Healthcare, to NYC-HH employees (Nov. 1, 2011), http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/10/Harlem-Invitation.pdf (inviting staff to forum).

Partnering with labor gives these quality-improvement efforts workforce credibility and encourages frank employee participation, as NYC-HH recognized and sought to benefit from in connection with a staff safety-culture survey. A team of union and management representatives drafted the survey, which was used to evaluate residents' perceptions of safety culture, to identify ways to make patient-safety training more robust, and to "[a]lign labor and management goals on patient safety." Mei Kong, R.N. *et al.*, *An Assessment of Housestaff Experience of Safety Culture: What the Residents Revealed*, http://www.cirseiu.org/wp-content/blogs.dir/53/files/2015/10/HHC-NPSF-Final-2.pdf (last visited Nov. 3, 2015). Because the labor-management survey team understood that involving CIR would maximize participation, the team had the survey distributed by union members and staff and also enlisted union staff to publicize the

survey and visit departments to collect completed survey forms. *Id.*

NYC-HH frequently partners with the physician-members of SEIU's Doctors Council as well, and the NYC-HH/Doctors Council partnership will soon enter a more intensive phase. Because of NYC-HH and the Doctors Council's shared belief that "input [from] frontline clinicians into decision-making is essential" and that "[h]igh clinician engagement" and "professional satisfaction" improve patient care, the health care system and the doctors' union have agreed to form Collaboration Councils that will serve NYC-HH's mission by conducting quality-improvement projects and identifying needed educational programs. NYC-HH & Doctors Council, *Collaboration Councils Agreement*, 4–8, http://doctorscouncil.org/wp-content/uploads/2015/10/HHC-Doctors-Council-SEIU-Collaboration-Councils-Contract-Language.pdf (last visited Nov. 6, 2015). Prior to agreeing to these new cooperative structures, the Doctors Council commissioned Cornell University to survey its members about their quality-improvement interests, finding that 98% of union-member respondents wanted quality improvement to be a union priority. *See QI Survey Says*, Newsletter (Doctors Council, New York, N.Y.), Apr. 2014, at 1, http://doctorscouncil.org/wp-content/uploads/2015/09/QI-Mailer-April-2014-NF.pdf. The union also prepared a white paper in consultation with Cornell to examine the benefits NYC-HH could achieve through enhanced partnership. *See* Doctors Council, *Putting Patients First Through Doctor, Patient and Community Engagement* 9 (Spring 2014), http://doctorscouncil.org/wp-content/uploads/2015/10/White-Paper-Doctors-Council-SEIU.pdf.

In all these circumstances, through all these joint projects, labor-management partnerships serve public health care employers' quality and efficiency interests. And in a world in which needed changes to workplace practices all too often meet with resistance, generate acrimony, or founder without adequate input from staff, union participation in employer efforts helps to elicit workers' valuable ideas, gives such efforts workforce credibility, and thus aids management in achieving quality and efficiency goals that would be harder to achieve unilaterally.

III. FAIR-SHARE FEES SERVE EMPLOYER INTERESTS BY ENABLING AND STRENGTHENING LABOR-MANAGEMENT PARTNERSHIPS.

Just as it is clear that labor-management cooperation often serves employer interests, it is equally clear that fair-share fees enable and strengthen cooperative efforts, making employers' partnership strategies more likely to succeed.

Fair-share-fee policies aid employers' partnership strategies in a number of ways. They play an important role in overcoming workforce skepticism about cooperative efforts by ensuring that employers have credible union partners capable of legitimating cooperative work among the rank and file. Fair-share-fee policies also foster the kind of stable, cooperative labor-relations environments necessary for successful partnership, and they ensure that employers' labor partners have sufficient resources to make long-term contributions to cooperative work, further validating that work among employees and reducing employer costs.

A. Fair-Share Fees Play an Important Role In Overcoming Workforce Skepticism.

Research shows that many employees are initially "skeptical" of labor-management cooperation, Laing *et al.*, *supra*, at 5, and that employee skepticism is a significant obstacle to successful partnership. Employees are skeptical because they fear that management will not take their ideas seriously, will not follow through, will retaliate against them for expressing concerns, or will otherwise use information they provide against them. *See, e.g.*, The Dunlop Comm'n on the Future of Worker-Management Relations, *Fact Finding Report* 49 (May 1994) [hereinafter *Dunlop Fact Finding Rep.*], *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=key_workplace (workers had experienced management's failing "to follow through and stay committed to [partnership] efforts"); Avgar *et al.*, *supra*, at 15 (cooperation often perceived as "risky" by employees because it requires commitment to new model "with fewer employee safeguards"); *cf.* Kochan *et al.*, *supra*, at 78–79 (describing previous Kaiser program that collapsed when managers used "program punitively"). These employee fears are a significant obstacle to successful partnership because employees' frank participation in collaborative structures depends on their feeling "safe" and "effective" in voicing ideas. Avgar *et al.*, *supra*, at 15; *see also Dunlop Fact Finding Rep.*, *supra*, at 49 ("Workers must trust management to use the fruits of worker participation to benefit employees as well as shareholders.").

One of employers' few proven strategies for overcoming workforce skepticism is to partner with unions that are stable and well-respected enough to legitimate cooperation in the eyes of the workforce. If

a union that employees see as an independent and effective advocate commits to labor-management partnership, the union's commitment effectively "vouches for" cooperation and reassures employees that participating in partnership will be safe and effective. *See, e.g.*, Gittell, *supra*, at 166–67 ("Union representation can give an organization increased legitimacy with its employees, and thus serve as a key element of a system of coordination and control if employee representatives are respected. ...") (footnote omitted); Avgar *et al.*, *supra*, at 15–16 (managerial engagement with unions in a manner that gives the latter "influence in the workplace" translates into "higher levels of employee trust," which is important for partnership success). If a union or other employee representative is seen as weak and beholden to management, however, a partnership with that representative is unlikely to have credibility with the workforce and is, therefore, unlikely to generate meaningful benefits for the employer. *See, e.g.*, Irving Bernstein, *The Lean Years: A History of the American Worker, 1920-1933*, 163, 173 (Haymarket Books ed., 2010) (1969) (describing employee-participation plans that failed because worker representatives appeared "timid" or focused on "curry[ing] favor with management"); *see also* Gittell, *supra*, at 172–73 (describing how most Continental Airlines employees became dissatisfied with management-created employee interest groups); *cf. Dunlop Fact Finding Rep.*, *supra*, at 41 ("A strong alliance requires two strong members." (quoting management executive)).

For partnership-minded public employers facing these realities, fair-share-fee requirements are an important tool because they overcome the collective-action problem that otherwise weakens even

employee-supported unions and reduces their effectiveness as collaborative partners.

As economist Mancur Olson explained in his leading work on collective action, unions provide goods that benefit employees as a group, but individual employees have a personal interest in maximizing their own income that is best served by their paying as little (and their co-workers as much) for collective goods as possible—especially when, as in the case of unions subject to the duty of fair representation, free riding by any individual employee is perceived by that person as essentially cost-free. *See Mancur Olson, The logic of Collective Action: Public Goods and the Theory of Groups* 1-16, 33-52 (2d ed. 1971). Because of this conflicting-interest dynamic, "rational, self-interested individuals" will not secure the "optimal amount" of union-provided "collective good[s]" that they would in the abstract prefer unless induced in some way to group action, such as by a fair-share-fee requirement. *Id.* at 2, 35; *see also id.* at 15–16, 50–51.[6]

In other words, absent some policy that aids employees in overcoming the collective-action hurdle, unions will be weaker and less stable than employees themselves actually want, *see, e.g.*, *id.* at 34–35, 85–

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[6] Robust, members-only benefits might in some circumstances be sufficient to induce group action, but the option of relying on such benefits is largely closed to unions by the duty of fair representation. *See id.* at 75. Feelings of personal or emotional commitment, as opposed to external inducements, might lead some employees to "behave irrationally" for a time, continuing to pay for collective union goods that peers enjoy for free, *id.* at 87, but that phenomenon cannot be depended upon and will leave a union less strong and less durable than it would otherwise have been, *id.*, than the employees themselves would want, *see id.*, and than many public employers, seeking the benefits of labor-management collaboration, would have an interest in fostering.

87, and less able to further employer interests by legitimating partnership strategies. Fair-share-fee requirements provide the policy aid employees need to overcome their collective-action hurdle, enabling them to obtain the desired amount of union collective goods and providing employers with strong, stable partners capable of legitimating labor-management collaborative work.

Data support the view that even employee-supported unions are weakened and less effective as collaborative partners if they cannot collect fair-share fees. Unions operating in states that prohibit fair-share-fee requirements are, for example, less financially stable than unions operating in states that allow them, even though unions in both types of states must demonstrate majority support. *See, e.g.*, Email from Bill Dempsey, SEIU Chief Fin. Officer, to Nicole Berner, SEIU Deputy Gen. Counsel (Oct. 23, 2015, 4:27 EDT) (on file with author) (SEIU and one of its fair-share-supported local unions had to provide $9,747,760 in rebates and subsidies to Florida affiliates and $2,761,577 in rebates and subsidies to Texas affiliates between 2012 and 2014). A given state's prohibition of fair-share fees also often leads almost immediately to a significant decline in union membership, *see, e.g.*, Jonathan Oosting, *Mich. Union Membership Dropped Significantly in 2014, First Full Year Under Right-to-Work Law*, mlive.com (Jan. 23, 2015), http://www.mlive.com/lansing-news/index.ssf/2015/01/michigan_union_membership_down.html, which is a result much more easily explained by the economic principles discussed above than by some

sudden, en masse ideological change. *Cf. Olson*, *supra*, at 1–16, 34–35, 87.[7]

Given these dynamics and data, it is entirely reasonable for public employers to believe that fair-share-fee policies foster the kind of stable, credible union partners capable of legitimating partnership work, and, therefore, for public employers to see fair-

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[7] Recent behavioral-economics work provides additional evidence that prohibiting fair-share fees artificially reduces union strength and stability, undermining labor's usefulness as a collaborative partner. Behavioral economists have shown that individuals make purchasing decisions not only on the basis of goods' absolute or abstract value but also on the basis of goods' comparative prices and potential purchasers' financial standing vis-à-vis their peers. *See, e.g.*, Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* 2–21 (revised & expanded ed. 2009); Cass R. Sunstein & Robert H. Frank, *Cost-Benefit Analysis and Relative Position* 2–3, 9–10 (Univ. of Chicago, John M. Olin Law & Econ. Working Paper No. 102, 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=237665. This means that a $10 union membership seems less expensive to an employee whose peers pay $8 fair-share fees (scenario A) than to an employee whose co-workers pay $0 but get the same advantages (scenario B), even though the membership price is the same in both cases. This is so because $10 compares more favorably to $8 than to $0 and because being $2 less well off than one's peers is better than being $10 less well off. *See* Sunstein & Frank, *supra*, at 2–20. For these reasons as well, a union's strength and effectiveness, including as a collaborative partner, is likely to suffer in the absence of fair-share fees, even when most employees support unionization.

That unions deprived of fair-share fees will be weaker than employees actually want is further demonstrated by the fact that when employees have been given a vote on fee policies they have chosen overwhelmingly to impose fee requirements on themselves. *See* Olson, *supra* at 85 (when union-shop policies put to a vote, "more than 90 per cent of the employees vot[ed] for compulsory union membership").

share-fee policies as furthering their interests in reaping the benefits of cooperation.

B. Fair-Share Fees Encourage Cooperative Culture.

Fair-share fees also play an important role in enabling and strengthening labor-management partnerships by reducing incentives unions and employers might have to treat each other as adversaries.

Labor-management partnership strategies perform best in workplaces with collaborative rather than adversarial labor-relations cultures. Indeed, the "benefits of [partnership] rest, to a large extent, on the ability of labor and management to reconfigure their relationship from adversarial to collaborative." Avgar *et al.*, *supra*, at 10–11. The "less cooperative the relationship between labor and management," the less likely it is that the parties will "be able to discover or realize joint gains." Appelbaum & Hunter, *supra*, at 288; *see also* Klingel & Lipsky, *supra*, at 21 (according to executive, "hospitals with more traditional, arms-length relationships with unions are less likely to fully utilize [joint] Training Fund benefits").

Fair-share-fee policies aid the difficult transition from adversarial to collaborative culture by eliminating a key reason for labor combativeness: institutional insecurity. An unstable and institutionally insecure union must constantly campaign to overcome the free-rider problem and shore up its finances, and a union in campaign mode has an incentive to emphasize the dangers employees face if the union is weak, which invites adversarial labor-management relations. *See, e.g.*, Neil W. Chamberlain & Donald E. Cullen, *The Labor Sector* 173 (2d ed. 1971) (insecure unions have incentive to "mak[e] excessive demands" or "process[]

unwarranted grievances" to "demonstrate that they can 'get something' for their members"); Appelbaum & Hunter, *supra*, at 285, 288 (unstable unions' "continued attention to ... security" can "distract" from joint work, and insecure unions will "find it difficult to engage" in important "kinds of cooperation"); *see generally id.* at 282 ("As with other partnerships, the institutional security of the union and the perception of the union that management will not ... undermine that security are important prerequisites for success[.]"). Thus, fair-share-fee requirements, by providing union security, enable partnership success.

C. Fair-Share Fees Encourage Long-Term Commitments To Cooperation.

Finally, fair-share-fee requirements serve employers' interests by ensuring that their union partners can make long-term financial (and other) contributions to cooperative work, further validating that work among employees and increasing the chances for partnership success.

Experts agree that employee "buy-in" in the form of labor contributions to partnership makes cooperation much more likely to succeed and also that it takes time for labor-management partnerships to generate maximum benefits. *See Dunlop Fact Finding Rep.*, *supra*, at 46 ("workplace innovations that remain in place over an extended period of time and are integrated into a system's approach ... produce the most improvements in economic performance"); *id.* at 36–37 ("some employee participation efforts do not survive long enough to have significant positive economic effects" and those in which "the union is ... a joint partner with management are particularly likely to survive"); Kochan *et al.*, *supra*, at 22 ("[Partnerships] require the

resources and fortitude to invest in infrastructure and joint processes that take time to show results."); Klingel & Lipsky, *supra*, at 56–57 (union members' trading other gains for partnership benefits "increas[es] their commitment" and gives them a "shared stake" in the success of labor-management training funds). Fair-share-fee requirements provide the stability and resources unions need in order to make the kind of significant, long-term investments in partnership that help employers' cooperative strategies succeed.

For these and all the other reasons given above, it is eminently reasonable for public employers to see fair-share-fee policies as serving their interest in successful labor-management partnership, and public employers' interest in successful partnership weighs heavily against petitioners' claims. Public employers should have the same ability private employers have to reap the benefits of cooperation—not be put at a competitive disadvantage with respect to those benefits.

CONCLUSION

The Ninth Circuit's decision should be affirmed.

Respectfully submitted,

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